

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.**

**FILED BY CLERK**  
**SEP 23 2009**  
COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2009-0132-PR
	)	DEPARTMENT A
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
GILBERT VALENTE BOJORQUEZ,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-40264

Honorable Richard Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Respondent

Gilbert V. Bojorquez

Florence  
In Propria Persona

H O W A R D, Chief Judge.

¶1 Pursuant to a plea agreement, petitioner Gilbert Bojorquez pled guilty to attempted sexual conduct with a minor under the age of fourteen (count one) and sexual abuse of a minor under the age of fourteen (count four), both dangerous crimes against

children. The trial court sentenced him to an aggravated, fifteen-year prison term on count four, followed by a consecutive, aggravated term of ten years on count one. Bojorquez sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., numerous times before filing the petition that gave rise to this petition for review. Again he challenges the court's denial of relief. Absent an abuse of discretion, we will not disturb the trial court's rulings in this proceeding. *See State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986).

¶2 In this petition, it appears Bojorquez is raising many of the same claims he has raised previously. As the trial court pointed out in its minute entry filed February 3, 2009, Bojorquez had received an evidentiary hearing in April 2007 on his claim of ineffective assistance of counsel. He continued, the court noted, to file "so many pleadings . . . not provided by the rules that the court and the State cannot keep track of them." The court added that nevertheless, it had "reviewed the pleadings and read the cases cited, and finds that they are [meritless] and precluded under Rule 32.2.a.(2)."

¶3 Bojorquez first asserts that the "old Rule 32.2(a)(3)" applies to him because "he was convicted in . . . 1991" and that, therefore, in order for his claims to be precluded, "he must [have] knowingly, voluntarily, and intelligently not raised [them] at trial, on appeal or in previous collateral proceedings." But, his petition is governed by Rule 32.2 as amended in 1992, not the version of the rule on which he relies. *See* 171 Ariz. XLIV (1992 amendments to Rule 32 "applicable to all post-conviction relief petitions filed on and after September 30, 1992"). Thus, Bojorquez must establish that his claims are of sufficient constitutional magnitude that they may not be deemed waived by his failure to raise them in

previous post-conviction proceedings. *See* Ariz. R. Crim. P. 32.2(a)(3) cmt; *State v. Swoopes*, 216 Ariz. 390, ¶ 22, 166 P.3d 945, 952 (App. 2007). He has not shown that either his challenges to his sentence or his argument related to former A.R.S. § 13-604.01 and A.R.S. § 13-1405 constitute such a claim. Thus, he has not shown the trial court abused its discretion in finding his claims precluded.

¶4 Bojorquez also contends the trial court held ex-parte communications with the state. But, the only support for this allegation is Bojorquez’s own affidavit, which is not based on personal knowledge and, therefore, is insufficient to support his claim. Bojorquez also asserts that, because the state had not filed a response, the trial court “act[ed] on behalf of the State” in ruling on his petition. This claim is without merit. “[A]ny court on review of the record may determine and hold that an issue is precluded regardless of whether the state raises preclusion.” Ariz. R. Crim. P. 32.2(c).

¶5 Additionally, to the extent Bojorquez argues the trial court was biased and should have been removed from the matter by the presiding judge, we disagree. “Judges are presumed to be impartial, and the party moving for change of judge must prove a judge’s bias or prejudice by a preponderance of the evidence.” *State v. Ellison*, 213 Ariz. 116, ¶ 37, 140 P.3d 899, 911 (2006), *quoting State v. Smith*, 203 Ariz. 75, ¶ 13, 50 P.3d 825, 829 (2002). Essentially, Bojorquez’s complaints about the trial court are based on its ruling against him. Judicial rulings alone are generally insufficient to prove bias. *Id.* ¶ 40. Thus, Bojorquez has not met his burden to prove bias in this matter.

¶6 Lastly, Bojorquez maintains that *State v. Gonzalez*, 216 Ariz. 11, 162 P.3d 650 (App. 2007), was “a significant change in the law,” entitling him to relief under Rule 32.1(g). Our supreme court, however, has already determined *Gonzalez* was not a significant change in the law. *State v. Shrum*, 220 Ariz. 115, ¶ 23, 203 P.3d 1175, 1180 (2009). We have no authority to rule otherwise. *See State v. Stanley*, 217 Ariz. 253, ¶ 28, 172 P.3d 848, 854 (App. 2007).

¶7 Finally, based on the supplemental materials submitted on review, Bojorquez appears to be raising new claims that were not presented to the trial court. We will not consider them. *See Ariz. R. Crim. P. 32.9(c)(1)(ii)* (petition for review shall contain “[t]he issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review”); *see also State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (issues may not properly be raised for first time in petition for review). To the extent they are supplemental arguments to claims already made, they do not persuade us the court abused its discretion in denying relief. Thus, we grant the petition for review and deny relief.

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JOSEPH W. HOWARD, Chief Judge

CONCURRING:

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PHILIP G. ESPINOSA, Presiding Judge

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GARYE L. VÁSQUEZ, Judge